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Nos. 741, 742, 744

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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNION TRANSFER COMPANY, DBA UNION FREIGHTWAYS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HUGHES TRANSPORTATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	3
Nos. 742 and 744 (*Hughes* and *Kentucky*)	3
No. 741 (*Union Transfer*)	5
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

Hughes Transp., Inc. v. *United States*, 128 C. Cls. 221, 121 F. Supp. 212	5
Hughes Transp., Inc. v. *United States*, 132 C. Cls. 804	5
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261	9
Public Utilities Commission of California v. *United States*, 355 U.S. 534	2, 3, 5, 6, 7, 8, 9
Railroad Commission of Texas v. *United States*, 317 S.W. 2d 927	9
United States v. *Pennsylvania Public Utilities Commission*, 393 Pa. 537, 143 A.2d 341, certiorari denied, 358 U.S. 884	9

Constitution and statutes:

Constitution of the United States: Article VI	7
Kentucky Revised Statutes, Chapter 281 (1948 and 1950	2
Nebraska Laws, 1955, c. 285, §§ 1, 2, p. 894, Nebraska Revised Statutes, 75-508, 75-508.01 (1958 reissue)	10, 12
Nebraska Revised Statutes, Chapter 75	3

Miscellaneous:

Page

Department of Motor Transportation—15, Part II, par. 6 (Ky. 1950) 7

Division of Motor Transportation—12, Part II, par. 11 (Ky. 1949) 7

Nebraska Railway Commission, Order of February 1, 1955 ..... 5, 9

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OPINIONS BELOW

In the *Hughes Transportation* case, Nos. 742 and 744, the opinion of the United States Court of Claims (H. Pet. App. pp. 1a, 3a) is reported at 168 F. Supp. 219.

In the *Union Transfer* case, No. 741, the opinion of the United States Court of Claims (U. Pet. App., pp. 20-23) is reported at 168 F. Supp. 217.[1]

JURISDICTION

The judgments of the United States Court of Claims in both cases were entered on December 3, 1958. The petitions for writs of certiorari were filed on March 2, 1959 in Nos. 741 and 742 and on March 3, 1959 in No. 744. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below correctly applied *Public Utilities Commission of California v. United States*, 355 U.S. 534, in holding that the States cannot nullify agreements between the United States and motor carriers for intrastate transportation of federal property at rates lower than those prescribed generally by State tariffs.

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of Chapter 281 of Kentucky Revised Statutes, 1948 and 1950, and regulations under such Kentucky statutes are set forth in H. Pet. App., pp. 11a-17a.

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[1] For brevity, we shall use the abbreviations "U. Pet." and "U.R." to designate respectively the petition and record in No. 741, and "H. Pet." and "H.R." to designate respectively the petition and record in No. 742. As the petition and record in No. 744 are, in all practical effect, identical to those in No. 742, they will not be cited separately.

The pertinent sections of Chapter 75 of the Nebraska Revised Statutes are set out in U. Pet. App., pp. 24-27, and in an appendix hereto, *infra*, p. 12.

STATEMENT

These cases involve suits by motor carriers to collect from the United States the difference between the charges they made to and collected from the United States for intrastate shipments of Government property and the higher charges to which the carriers claim they are entitled under the tariffs of their respective States. In each case the United States moved for summary judgment on the basis of this Court's decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. The Court of Claims granted both motions, holding that under the rule of the *California Commission* case the State tariffs could not be applied to intrastate shipments of property for the United States.

Nos. 742 and 744 (Hughes and Kentucky)

The petitioner in No. 742, a motor vehicle contract carrier certified by the Kentucky Department of Motor Transportation, transported for the United States Department of the Army in 1948 and 1950 shipments of ammunition between Army installations located within Kentucky (H.R. Doc. 1, p. 2). The petitioner billed the Government and was paid for these shipments pursuant to a special rate which it had given to the Department of the Army (H.R. Doc. 1, pp. 2-3). This special rate was less than that prescribed by Kentucky, as contained in applicable intrastate motor carrier

tariffs on file with the Kentucky Department of Motor Transportation which had not been waived by that Department (H.R. Doc. 1, pp. 5-7).[2]

After the Government had paid the bills submitted by the petitioner, a dispute arose as to the interpretation of the shipping contract (H.R. Doc. 1, pp. 5-7). The Government concluded that under the contract terms the petitioner had been overpaid and, accordingly, reimbursed itself from other sums due petitioner (H.R. Doc. 1, p. 5). The petitioner thereupon filed the present suit against the United States in the Court of Claims to recover the sums deducted. Alternatively, the petitioner sought the difference between the net amount it had quoted to the Government and had received and the higher amount prescribed by the applicable Kentucky tariffs. It based the latter demand on the contention that, as the shipments were in intrastate commerce, they were subject to rate regulation by Kentucky (H.R. Doc. 1, p. 8). In a second suit in the Court of Claims based on similar shipments, the petitioner sought recovery only on the basis of the applicability of the Kentucky tariff (H.R. Doc. 21). The Commonwealth of Kentucky intervened in both proceedings (H.R. Docs. 7, 30).

The Court of Claims in [illegible] case entered a judg-

[2] Prior to June 15, 1950, the Department of Motor Transportation was called the Division of Motor Transportation. The change came about through the enactment of a new Motor Carrier Law effective June 15, 1950, (H.R. Doc. 14, pp. 154-55). For brevity we will term the state agency generally as the "Department of Motor Transportation." The regulations of the old Division of Motor Transportation were continued in effect until December 10, 1950. As the shipments here in issue took place during the effectiveness of both the old and the new Acts and their respective regulations, both are here material. Relevant portions of each are quoted in H. Pet. App., pp. 11a-17a.

ment for the petitioner, holding, *inter alia*, that the Kentucky regulations could validly be applied to intrastate shipments made by the United States (H.R. Doc. 12). *Hughes Transp., Inc.* v. *United States*, 128 C. Cls. 221, 121 F. Supp. 212. The case was then referred to a Commissioner to take evidence on whether Kentucky had exempted the ammunition from its tariff (H.R. Doc. 16). *Hughes Transp., Inc.* v. *United States*, 132 C. Cls. 804.

The matter stood in the above posture when this Court decided *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. The Government then moved for summary judgment in both cases,[3] based on the *California Commission* decision (H.R. Doc. 18). The Court of Claims granted the Government's motions, holding that by the authority of *California Commission* the application of the Kentucky rates was invalid (H. Pet. App., pp. 1a-3a). Both the carrier and the State have petitioned for certiorari.

No. 741 (Union Transfer)

The petitioners, motor vehicle common carriers certified by the Nebraska Railway Commission, transported for the United States Departments of the Army and the Navy in 1952-1955 shipments of ammunition between various military installations and depots located within the State of Nebraska (U.R. 2-3, 9-124).

On February 1, 1955, the Nebraska State Railway Commission ordered the petitioners to collect from the Federal Government all undercharges which occurred

[3] In the first case the Government sought and was granted only partial summary judgment, leaving still to be litigated the interpretation of the negotiated contract.

subsequent to January 1, 1942, due to carriage of property for the United States at rates lower than those prescribed by the Nebraska tariff for commercial shipments (U.R. 4, 113-14, U. Pet. App., pp. 28-29). The petitioners, following the order of the Railway Commission, filed claims with the United States General Accounting Office for the undercharges. Upon their disallowance, the petitioners sued the United States in the Court of Claims to recover the difference between the charges they made and collected from the Government and the higher charges prescribed by the Nebraska tariff (U.R. 5-7).

The Government moved for summary judgment on the ground that the matter was controlled by this Court's decision in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (U.R. 115-16). The Court of Claims granted the Government's motion, holding that by the authority of *California Commission* intra-Nebraska shipment of property by the Government was not subject to rate regulation by Nebraska (U. Pet. App., pp. 20-23).

ARGUMENT

The only question presented by these petitions was settled by this Court in the *California Commission* case, *supra*, only one year ago.[4] There, the Court ruled that, on shipments of federal property, a State can not interfere with the Federal Government's attempts to negotiate with a carrier for a rate lower than that charged private shippers. The facts presented by the instant case clearly fall within the principle set forth in the

[4] The Petitioner Hughes participated as *amicus curiae* in the *California Commission* case. At that time it presented substantially the same arguments on which it now wishes the Court again to pass.

California Commission case and do not call for a further review by this Court. Also, certiorari should be denied in No. 741 (*Union Transfer*) on the additional and independent ground that new state legislation has deprived the case of importance.

1. In the *California Commission* case, this Court found that "numerous and extensive" regulations, promulgated to carry out the basic program of the Armed Services Procurement Act and having "the force of law, * * * sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U.S. at 542-43. The California statute would have permitted "this discretion of the federal officers [to] be exercised and reduced rates used only if [its] Commission approves." 355 U.S. at 543. In these circumstances, this Court found a clear conflict between the national law and State law, and ruled that, under the supremacy clause of Article VI of the Constitution, the former must prevail.

The exact same conflict exists in the *Hughes* case (Nos. 742, 744). The regulations of the Kentucky Department of Motor Transportation provide that, though rates to be charged by a contract carrier must ordinarily be no less than the minimum prescribed for common carriers, the Department may approve a different rate. (1949) D.M.T.-12, Part II, par. 11 (H. Pet. App., p. 15a); (1950) D.M.T.-15, Part II, par. 6 (H. Pet. App., pp. 15a-16a). Though the language here and that of the California statute differ somewhat, their substance is the same. Under the regulatory

scheme of either State, federal officers could exercise their discretion under federal law to negotiate reduced rates only with the approval of State officers.

Notwithstanding the clear provision of the Kentucky regulations to the contrary, petitioners Hughes and Kentucky contend that the Kentucky scheme of regulation differs from that of California in that the Kentucky Department does not have discretion to allow the Government and the contract carrier to negotiate rates lower than those provided by the Kentucky tariff. They assert that this difference distinguishes the Kentucky tariff structure from that of California. The petitioners in *Union Transfer* (No. 741) present the same argument as concerns the Nebraska regulatory scheme. However, assuming *arguendo* that the Kentucky and Nebraska situations do differ from that of California, the conflict between federal law and State law in the instant cases is even more direct than in the *California Commission* case. For, if the petitioners' argument and attempted distinction are correct, Kentucky and Nebraska laws will then be allowed completely to forbid federal officers from discharging their function under the federal regulations. There would be an absolute bar against their negotiating for rates below those currently established for common carriers. Thus, any absence of discretionary authority to permit negotiation for reduced rates, far from being a distinguishing point as petitioners claim (H. Pet. 7-8, U. Pet. 10-12), makes these stronger cases for the application of the basic principle enunciated in *California Commission*, *i.e.*, that under the supremacy clause a State regulation must yield where its enforcement would impair or frustrate the functioning of a federal program. In fact, the absence of the authority to ap-

prove reduced rates would eliminate one of the principal grounds on which the dissent in the *California Commission* case was based. 355 U.S. 548-552.

The petitioners' reliance on *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261, is as misplaced here as was appellant's reliance on that decision in the *California* case. There, the Court noted that the *Penn Dairies* case "can likewise be put to one side." 355 U.S. at 543. Identical considerations require that the *Penn Dairies* case be put aside here. As the court below noted in the instant cases, a reading of the opinion in *California Commission* shows clearly that this Court did not reach its result in that case because of the procedure existing in California but because of what it termed "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates * * *." 355 U.S. at 544. This conclusion has also been reached by the Supreme Court of Pennsylvania: *United States* v. *Pennsylvania Pub. Util. Comm'n*, 393 Pa. 537, 143 A. 2d 341, certiorari denied, 358 U.S. 884, and by the Supreme Court of Texas, *Railroad Comm'n of Texas* v. *United States*, 317 S.W. 2d 927, 930. Since the very same conflict exists here, the *Penn Dairies* case is plainly not in point.

2. The petitioners in No. 741 (*Union Transfer*) assert, as their reason for seeking payment from the Government in excess of those to which they had agreed, only that they are acting in compliance with the February, 1955, order of the Nebraska Railway Commission requiring that they collect the additional amounts. (U. Pet. 7-8). This order has now become a nullity.

In September, 1955, the Nebraska legislature amended the State statute so as to exempt from the

regulatory power of the Railway Commission reduced rates for the carriage of property for the United States. Nebraska Laws, 1955, c. 285, § 1, p. 894; Rev. Stat. Neb. 75-508 (1958 reissue); Appendix, *infra*, p. 12. Further, the legislature gave this exemption retroactive effect by prohibiting the Railway Commission from imposing a "fine, penalty, or forfeiture of any kind" upon any common carrier for having "heretofore failed to collect the regularly lawfully established intrastate rate in Nebraska" for any intra-Nebraska "transportation services heretofore performed for the United States." Nebraska Laws, 1955, c. 285, § 2, p. 894; Rev. Stat. Neb. 75-508.01 (1958 reissue); Appendix, *infra*, p. 12. In so doing Nebraska removed from its Railway Commission the power to force a carrier to collect from the United States rates higher than those provided for in the carriage contract negotiated between the parties. As this amendment had retroactive effect, it rendered the order of February, 1955, a nullity.

As the petitioners' asserted reason for bringing the current action is their desire to comply with the order of the Railway Commission and as this order has been nullified by the action of the Nebraska legislature, the obligation on petitioners to seek the refund has been removed. More important, however, the change in Nebraska law has deprived this case of any importance for the future. There is no longer any need for this Court to pass upon a possible conflict between the law of Nebraska and federal law since the Nebraska legislature has acted to eliminate any inconsistency.

CONCLUSION

The decision below is correct and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1959.

Rev. Stat. Neb. § 75-508 (reissue 1958):

Common carriers; reduced rates; when permitted. Nothing contained in the provisions of sections 75-501 to 75-512 shall prevent (1) the carriage, storage, or handling of freight free, or at reduced rates, for the United States, for the state, for any city, village, or county government, for charitable purposes, or to and from fairs and expositions for exhibition thereat; (2) the transporting free of household goods of express employees or railroad employees, moved in the services of their respective companies; (3) the transporting free of personal property of those who are employed exclusively by express companies or railroad companies; or (4) any common carrier from carrying property free, with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

Rev. Stat. Neb. § 75-508.01 (reissue 1958):

Common carriers; failure to collect for intrastat transportation in state performed for United States; waiver of fine, penalty, or forfeiture. No common carrier shall be subject to any fine, penalty, or forfeiture of any kind for having heretofore failed to collect the regularly lawfully established intrastate rate in Nebraska for any intrastate in Nebraska transportation service heretofore performed for the United States, as provided in section 75-508.

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